United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 74-1218

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1218, 1265, 1266, 1354, 1438

IN THE MATTER OF THE COMPLAINT
of
COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability.

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS,
Appellant.

69 Civ. 5303

BINGHAM & COMPANY, et al.,
Plaintiffs-Appellants,
against
THOS. & JNO. BROCKLEBANK, LTD.,
Defendant-Appellee.

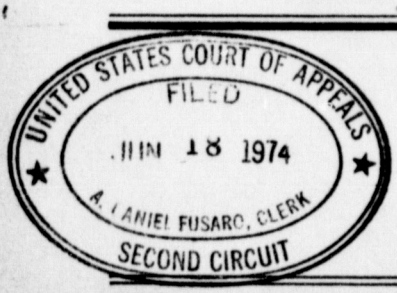
70 Civ. 290

KELLER INDUSTRIES INC.,
Plaintiff-Appellant,
against
THOS. & JNO. BROCKLEBANK, LTD., et al.,
Defendants-Appellees.

69 Civ. 4644

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT KELLER INDUSTRIES, INC.



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BRIEF FOR PLAINTIFF-APPELLANT KELLER INDUSTRIES, INC.

Statement

This is an appeal by plaintiff-appellant Keller Industries, Inc. (hereafter "appellant-Keller") from paragraphs "1", "2", and "4" of the final judgment of the District Court, dated January 18, 1974. (119-122A) These paragraphs appealed from had:

"1" Exonerated the shipowner-appellee (Compania Naviera Epsilon, S.A. (hereafter "shipowner-appellee") from liability and dismissed appellant-Keller's claim against it for cargo loss and damage, (119-120A)—and had

"2" Dismissed appellant-Keller's complaint for cargo loss and damage against the charterer-appellee, Thos. & Jno. Brocklebank, Ltd. (hereafter "charterer-appellee"), (120A)—and had

"4" Awarded charterer-appellee a judgment of $10,593.47 in freight charges for the carriage of appellant-Keller's cargo which charterer-appellee had never delivered, and then awarded interest on said freight charges at 7½% and at 6%. (120A)

Issues Presented for Review

Each of the docketed cases herein has been consolidated for appeal. Therefore, with respect to its claim and complaint against shipowner-appellee and against charterer-appellees for its cargo loss and damage, and with respect to its contention that charterer-appellee is not entitled to recover freight moneys on a voyage frustrated as a result of the ship owner's failure to exercise due diligence to make the vessel seaworthy, appellant-Keller, adopts by

reference the Briefs and Reply Briefs to be filed herein on behalf of appellant-Bingham & Co. et al.

This Brief of appellant-Keller will be confined to the issue of the District Court's errors under paragraph "4" of its judgment in

a) holding that charterer-appellee could collect full freight on "cargoes" which "were totally or partially lost" due to the stranding caused by the "negligent navigation by the Master,—(108A-109A; 120A-122A) and in

b) holding that interest was due on such freight at 7½% from June 20, 1969 to August 31, 1972, and at 6% from September 1, 1972 to January 7, 1974. (120A-122A)

Facts

The MS NICOLAOS S. EMBIRICOS stranded on a reef off the Maldive Islands in the Indian Ocean, while en route from India to the United States. Most of its cargo, including most of appellant-Keller's cargo was totally lost. Some cargo was eventually salvaged.

The District Court found that the cause of the stranding, and of the appellants' "cargoes" sustaining "damage" or being "totally or partially lost" (108A), was the "negligent navigation by the master." (106A, 108A)

Nevertheless the Court held that charterer-appellee could collect full freight on cargo lost due to "negligent navigation by the master," even though charterer-appellee's "freight earned" bill of lading clause did *not* expressly provide that freight would be earned even when cargo was "lost" due to *negligence*. i.e.

> "Freight on the goods shall be deemed earned on shipment and shall be payable vessel and/or goods lost or not lost." (108A and Exhibit 4 at 229A)

In addition, the Court also awarded interest on such freight:

> "from June 20, 1969 to August 31, 1972 at 7½% per annum and from September 1, 1972 to January 7, 1974 at 6% per annum" (emphasis added) (120A-121A)

although the next paragraph in charterer-appellee's bill of lading provides that:

> "Interest at 5% per annum shall be paid on any freight and charges remaining unpaid after due date of payment." (emphasis added) (Exhibit 4 at 299A)

The Questions

Thus the questions set forth herein to be decided by this Court with respect to paragraph "4" of the District Court judgment (120A-122A) are:

a) As a matter of public policy or general maritime law, can a common carrier by water collect freight on cargo lost or non-delivered due to the negligent navigation of the vessel?

b) If public policy or general maritime law does not forbid this,—then does charterer-appellee's "freight earned" bill of lading clause, which does not expressly provide that freight is to be "earned" on cargo lost or non-delivered due to negligent navigation, nevertheless entitle charterer-appellee to collect freight on cargo lost or non-delivered due to negligent navigation?

c) Can charterer-appellee collect interest prior to judgment on unpaid freight at the rate of 7½% and 6% when its bill of lading specifically provides that "interest at 5% per annum shall be paid on any freight and charges remaining unpaid after due date of payment?"

POINT I

Common carrier recoveries of freight for lost or non-delivered cargo are limited to cases in which the loss or non-delivery of the cargo was not due to the vessel's fault or negligence.

Under the general maritime law freight is not earned unless the goods are delivered at destination.

> "the shipowners' interest in freight is 'at risk' because under the general maritime law of carriage he cannot collect it unless the goods are delivered to their destination, so that the loss of the goods entails the loss of freight as well." LAW OF ADMIRALTY, *Gilmore & Black,* at p. 221

Similarly, under the law, common carriers cannot stipulate for immunity from their own or their agents' negligence.

> "There is a general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence. While this general rule was fashioned by the courts, it has been continuously accepted as a guide to common-carrier relationships for more than a century and has acquired the force and precision of a legislative enactment." *U. S.* v. *Atlantic Mut. Ins. Co.,* 343 U.S. 236 at p. 239 (1951).

Freight "earned" clauses such as that in charterer-appellee's bills of lading on this voyage* have allowed the carrier to collect freight on lost or non-delivered cargo where the loss or non-delivery was *not* due to the fault or negligence of the carrying vessel.

---

* "Freight on the goods shall be deemed earned on shipment and shall be payable vessel and/or goods lost or not lost." (108A and Exhibit 4 at 299A)

"The provision of the carrier's bill of lading which declares that the freight is payable 'goods or vessel lost or not lost,' covers the liability of the shipper for freight if there is no delivery at all because the goods have been destroyed *through no fault of the carrier* . . . (80 F.Supp. 158 at p. 160) Although the common law rule was that freight was earned only if the shipment was delivered (The Louise, 1945 A.M.C. 363, 58 F.Supp. 445) nevertheless for many years bill of lading have contained the provision that freight was considered earned, vessel lost or not lost. And such provisions have been upheld where the loss *was not due to the negligence of the carrier.*" (emphasis added)

> *Alcoa Steamship Co.* v. *U.S.A.*, 80 F. Supp. 158 at p. 161-2 (S.D.N.Y. 1948) 1948 A.M.C. 1421 at 1431 (Rev. Oth.Gr. 338 US 421) (1949)

". . . a clause that prepaid freight is not to be refunded though the vessel be lost or the voyage not completed has been given controlling effect where the voyage was broken up by legal impossibility of performance, *without fault on the part of the shipowner and by causes beyond control of the carrier.*" (emphasis added)

> *Medit. Agencies* v. *Rethymnis & Kulukindis*, 185 F. Supp. 34 at p. 35 (S.D.N.Y., 1962) 1962 A.M.C. 201 at p. 203

In *Firestone International Co.* v. *Isthmian Lines Inc.*, 1964 A.M.C. 1284 (S.D.N.Y., 1964) (not otherwise reported) the Court held that the shipper was *not* liable for freight where the goods were damaged by *negligence* of the stevedore after their receipt by the carrier. The bill

of lading freight clause provided:

> ". . . Full freight . . . shall be completely earned on receipt of the goods by the carrier . . . cargo lost or not loss. . . . Full freight shall be paid although the goods may be damaged . . . (1964 A.M.C. 1284 at p. 1290)

Nevertheless, the Court held:

> "Under the provisions of the bill of lading libellant is *not* liable for the payment of the freight charges" (emphasis added) (1964 A.M.C. 1284 at p. 1291)

Alcoa S.S. Co. v. United States

In *Alcoa S.S. Co.* v. *U.S.*, 338 U.S. 421 (1949) cited in the District Court's decision (108A) the non-delivery of the goods was *not* due to the carrying vessel's fault or negligence, since the carrying vessel was torpedoed by the enemy.

Likewise, the two precedents cited in the *Alcoa* case,* (*supra;*) to support the following statement,—

> ". . . contractural provisions establishing the shipper's liability for freight regardless of actual delivery have been uniformly held valid, and have become common stipulations in carriers' bills of lading." (338 U.S. 421 at p. 422)

were cases in which the non-delivery of the cargo had been caused by a government, wartime embargo preventing the vessels from sailing. The non-delivery had *not* been caused by any fault or neglect by the carrier or vessel.

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* *International Paper Co.* v. *The Gracie D. Chambers*, 248 US 387; and *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 US 377, cited in footnote "2" at P. 422.

That the two Supreme Court holdings cited in the *Alcoa* case (*supra*) were cases in which the non-deliveries were *not* due to negligence was emphasized by Judge Herlands in *Rethymnis & Kulukindis* (185 F.Supp. 34 at pp. 35-36) where he said that:

> ". . . a bill of lading or charter party containing a clause that prepaid freight is not to be refunded though the vessel be lost or the voyage not completed has been given controlling effect where the voyage was broken up by legal impossibility of performance, *without fault on the part of the shipowner and by causes beyond control* of carrier. *Allanwilde Transport Corp.* v. *Vacuum Oil Co.* (1919) 248 U.S. 377; *International Paper Co.* v. *Gracie D. Chambers* (1919) 248 U.S. 38; *Standard Varnish Works* v. *Bris* (1919), 248 U.S. 392. *In these three cases, the ship was seaworthy and the voyage was frustrated by a government embargo, 'a restraint of princes or government.'* " (emphasis added)

The Globe & Rutgers Fire Insurance Co. v. United States

The District Court decision (109 A) also cites *The Globe & Rutgers Fire Insurance Co.* v. *United States,* 105 F2d 160 (2d Cir. 1939), for the District Court's conclusion that

> "It is essentially at war with COGSA's policy and, therefore, unacceptable" (109 A)

for charterer-appellee not to collect freight on cargo lost by the master's negligent navigation.

The Globe & Rutgers case, however, in *no way* supports this conclusion. The voyage in the *Globe & Rutgers* case took place in 1920

> "The Zaca sailed from Norfolk on October 1, 1920"
>
> *Globe & Rutgers* v. *U.S.A.* (CCA2d), 105 F2d 160 at P. 163.

This was sixteen years before the Carriage of Goods by Sea Act was passed by Congress. Thus the law and "policy" if any, which the *Globe & Rutgers* case was interpreting was *not* COGSA's but the Harter Act (46 U.S.C. 190-194), and the contract which the *Globe & Rutgers* case was interpreting under the Harter Act, was not a common carrier bill of lading, but a private contract of carriage, i.e., a charter party.

> "The charter party was executed in New York City on July 27, 1920 . . . and provided for a voyage from Hampton Roads . . . to . . . Buenos Aires with a full cargo of about 7,000 tons of coal . . . ."
>
> *Globe & Rutgers* v. *U.S.A.*, District Court Decision 1937 A.M.C. 1153 at P. 1155.

In the *Globe & Rutgers* case the vessel after sailing from Hampton Roads, encountered numerous engine breakdowns and put into Trinidad for fuel and repairs. While at Trinidad the vessel caught fire and had to be beached and the voyage abandoned. However there is *no* suggestion anywhere in the case that the fire, which damaged the cargo and resulted in the non-delivery of the cargo at destination, was caused by any fault or negligence or unseaworthiness of the carrier or the vessel. There is no suggestion that the vessel's prior engine breakdowns, which constituted unseaworthiness, were in any way causally connected with the fire. The fire and its consequences was considered as having been caused by accident, and not by negligence. The District Court held, and this was also implicit in the Circuit Court decision that:

> "In the case at bar, although the vessel was unseaworthy, her unseaworthiness was not the cause of the fire, nor was the neglect of the owner the cause of it." *Globe & Rutgers Fire Ins. Co.* v. *U.S.A.*, 1937 A.M.C. 1153 (S.D.N.Y.) at P. 1169.

In the *Globe & Rutgers* case, the lower court denied cargo's claim for cargo damage, because cargo had failed to prove that the fire was caused by the "design or neglect" of the shipowner:

> "In my opinion the libellants have not shown that the fire on the Zaca, or the spreading of the fire, was the result of the design or neglect of the owner. Nor does it seem to be that the owner failed to exercise due diligence in this respect." *Globe & Rutgers* (S.D.N.Y.) 1937 A.M.C. 1153 at P. 1165.

The Circuit Court affirmed this:

> "Judge Goddard, . . . found that the underwriters had not met the burden of showing that the fire or its spreading was the result of the design or neglect of the owner . . . He had ample ground for finding that the owner was not subject to liability for the reason that the fire was not caused by its design or neglect. We accordingly affirm his ruling that the Fire Statute was a good defense."
>
> *Globe & Rutgers* (CCA) 105 F2d 160 at P. 166.

It is most likely that the District Court misread the holding in the *Globe & Rutgers* as to why the carrier was permitted to retain the freight because the *Globe & Rutgers* case had refused to allow the carrier to recover general average from cargo because the shipowner had not exercised due diligence to make the vessel in *all* respects seaworthy. However the reason *Globe & Rutgers* rejected the carrier's claim for a general average contribution from cargo was that the Charter Party clause pertaining to the carrier's right to recover general average provided that if the shipowner did not exercise due diligence to make the vessel in *all* respects seaworthy, then general average could *not* be recovered even if the cause of the general average was an *"accident,"* unrelated to the unseaworthiness,—

> "The terms of the contract of affreightment in the case at bar made recovery of General Average conditional upon the exercise by the owner of due diligence to make the vessel in all respects seaworthy, and imposed that condition upon any recovery whether the loss resulted 'from *accident* or from default or error in navigation or in the management of the vessel or from any latent or other defect in the vessel, or machinery and appurtenances, or from unseaworthiness, * * *' The contract between the parties covered the loss that occurred here and precluded recovery of General Average where due diligence was not exercised." (emphasis added) *Globe & Rutgers Fire Ins. Co.* v. *U.S.* (2d Circ. 1939) 105 F2d 160 at P. 165

Thus the earlier unseaworthiness of the ship's engines, which *Globe & Rutgers* had held did not cause the fire, and which did not cause the non-delivery of the cargo, was held by *Globe & Rutgers* to prevent the carrier from recovering in general average.

Since the non-delivery of the cargo in the *Globe & Rutgers* case was *not* due to the fault or negligence or unseaworthiness of the vessel or of the carrier but to the accidental fire, the Court was able to rely on the Charter Party prepaid freight clause reading

> "freight . . . payable and/or not returnable, ship lost or not lost, cargo delivered or not delivered."
>
> *Globe & Rutgers* v. *U.S.A.*, 105 F.2d 160 (CCA2d) at P. 166.

to hold that the carrier could retain the full freight. The Court therefore cited *Standard Varnish Works* v. *Bris,* 248 U.S. 392, *Allanwilde Corp.* v. *Vacuum Oil Co.,* 248 U.S. 377 and *Intl. Paper Co.* v. *Gracie D. Chambers,* 248 U.S. 387, all cases in which a government, wartime embargo without fault or negligence by the carrier had prevented

the vessels from sailing, as precedents for allowing the carrier to retain the full freight.

The *Globe & Rutgers* decision also cited the *Malcomb Baxter, Jr.* (Republic of France v. French Overseas Corp.), 277 U.S. 323 for the proposition that

> "It has also been held that even in the case of an involuntary deviation or a breach of warranty of seaworthiness the shipowner may rely upon the clauses of the contract to retain prepaid freight." *The Globe & Rutgers* (*supra*), 105 F2d 160 at P. 167.

But in the *Malcolm Baxter* case *neither* the involuntary deviation *nor* the vessel's unseaworthiness was the cause of the non-delivery of the cargo.

In *Malcolm Baxter, Jr.* (*supra*) the Supreme Court held that the carrier could retain the freight because the MALCOLM BAXTER's failure to complete the voyage was *not* due to the MALCOLM BAXTER's earlier unseaworthiness or fault *or* to its involuntary deviation in putting into a port of refuge for repairs to cure its unseaworthiness, but was proximately caused by a subsequent, wartime, embargo which prevented the MALCOLM BAXTER from sailing. The Supreme Court said:

> "It was the embargo and not the unseaworthiness of the vessel which delayed the voyage after the Baxter was repaired and ready for sea on January 14, 1918, and the unseaworthiness of the vessel did not cause the embargo." *The Malcolm Baxter*, 277 U.S. 323 at P. 333.

Thus in *none* of the above cases has the cargo been lost or non-delivered by the negligence or fault of the vessel or the carrier.* In fact in the *Malcolm Baxter* case,

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* Thus when the *Globe & Rutgers* case said at P. 167:
"We think that the foregoing decisions show how strictly and literally prepaid freight clauses have been construed by the

(footnote continued on following page)

(*supra*) the Supreme Court suggested that if cargo were to recover its prepaid freight it would have to prove the carrier's negligence:

> "The respondent (shipowner) having brought itself within the exception under its bill of lading the burden is on petitioners to show that respondents' *negligence* was the cause or contributed to the loss." (emphasis added) *The "Malcolm Baxter", The Malcolm Baxter, Jr.—Republic of France* v. *French Overseas Corp.*, 277 U.S. 323 at pp. 333-334.

In the instant case Charterer-Appellee has been at great pains to successfully prove that the cause of the loss was the Master's negligent navigation, and the District Court has found the Master's negligence to be the cause of the loss of the cargo (108A). Therefore, in accordance with the above decisions, charterer-appellee should not be entitled to recover freight on cargo lost due to the Master's negligent navigation, and the District Court decision to the contrary should be reversed.

POINT II

In any event a common carrier can not recover freight on cargo lost due to the master's negligence unless its bill of lading "freight earned" clause expressly provides for recovery of freight on cargo lost because of negligence.

It is believed that the above rules of general maritime law and public policy i.e., that "the loss of the goods entails the loss of freight" and that "common carriers cannot

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(footnote continued from preceding page)

> Supreme Court. The facts of each afforded a much stronger claim for the return of freight than those here."

it was speaking of cases whose only question was whether to enforce a "freight earned" clause in a situation in which the cargo was lost or non-delivered *without* any fault or negligence by the vessel or by the carrier.

stipulate for immunity from their own or their agents' negligence" forbid common carriers from recovering freight on cargo lost by the vessel's negligence despite the Carriage of Goods by Sea Act (COGSA 46 USC 1300-15). COGSA provides that

> "the carrier . . . shall (not) be responsible for loss or damage . . . resulting from—
>
> (a) Act, neglect, or default of the master . . . in the navigation of the ship;"

However COGSA (which is in derogation of the common law) only provides that the carrier shall not be "responsible" (i.e. "don't have to pay") for cargo losses or damage resulting from master's negligent navigation. It does not go further and say that in addition the carrier shall be rewarded for "neglect or default" by thereby becoming entitled to collect full freight on cargo lost or non-delivered because of such neglect or default.

Accordingly, despite the change effected by COGSA with respect to carrier *defenses* against claims for cargo loss or damage, this Court should hold that a common carrier is still not permitted to collect freight on cargo lost or non-delivered due to its negligent navigation.

In any event a common carrier "earned freight", bill of lading clause can under no circumstances result in the carrier recovering freight on cargo lost by negligent navigation unless,—in accordance with the normal rules of interpretation of contracts of adhesion, the "earned freight" clause *expressly* provides for recovery even though the cause of the loss is *negligent* navigation.

It is elementary that exemptions are not construed to include negligence in the absence of an express stipulation to that effect.

> "But on familiar principles exemptions contained in bills of lading are never construed to cover the negli-

gence or default of the carrier unless that is expressly stipulated for."

The Toronto, 175 Fed. 632 at P. 634 (CCA 2nd 1909).

"The claim was made that there had been a special agreement . . . by which the canal boat was being towed at her own risk . . . if it be true . . . that, by special agreement, the canal boat was being towed at her own risk, nevertheless the steamer is liable, if, through the *negligence* of those in charge of her, the canal boat has suffered loss." (emphasis added)

Compania de Navegacion v. *Firemen's Fund Ins. Co.,* 277 U.S. 66 at P. 73-74 (1927).

"Therefore, where a contract of a carrier provides in general terms that its liability for losses for specified perils is excluded or limited, *an exception to this limitation is implied* of losses from the specified causes *where the negligence of the carrier contributed to the loss.*" (emphasis added)

Vol. 10 Williston on Contracts 3rd Ed. Sec. 1119 at p. 274.

"*Even in cases where exemption from liability for negligence is not illegal, a provision for such exemption will be strictly construed.* There are many cases holding that an exemption from liability for loss or damage in general terms will not be interpreted as an exemption from liability for harm negligently caused; to have such effect the provision must expressly include negligence and it must be such that it clearly includes the instant case." (emphasis added).

Vol. 6A Corbin on Contracts Sec. 1472 at P. 602.

Thus the normal interpretation of Charterer-Appellee's "earned freight" bill of lading clause*, is that it does not apply to freight on cargo lost by negligent navigation.

This is particularly true in view of the heavy presumption against common carriers in contracts of adhesion.

> "In accordance with the familiar rule in such circumstances, we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have."
>
> *SS Monroe etc.* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959) at p. 183.

That this indeed was the "intention" of the parties, can be more clearly seen by examining the rest of Charterer-Appellee's bill of lading.** Exhibit 4 at 299A-301A).

Thus where the charterer-appellee wishes to assure that it can collect general average contributions from cargo,

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* "Freight on the goods shall be deemed earned on shipment and shall be payable vessel and/or goods lost or not lost." (108A, Ex. 4 at 229A; unnumbered paragraph in front of bill of lading.)

** "The intention, or purposes of the parties to a contract is to be collected, ascertained, or gathered from the entire instrument, or the instrument as a whole, and not from detached or isolated portions, to consider all of its parts or provisions, *in order to determine the meaning of any particular part, or of particular language.* . . ." (emphasis added) (Vol. 17A Corpus Juris Secundum pp. 113-116)

> "The writing will be read as a whole, and every part will be interpreted with reference to the whole; . . ." (Williston on Contracts 3rd Ed. Vol. 4, Sec. 618 at P. 710)
>
> ". . . the terms of a contract are to be interpreted and their legal effects determined as a whole." (Corbin on Contracts, Vol. 3, Sec. 549 at P. 183)
>
> "The intention of the parties is to be gathered not from the single sentence above quoted, but from the whole instrument, . . ."
>
> (*Miller* v. *Robertson*, 266 U.S. 243 at P. 251 (1924).

even where the event requiring the general average resulted from the carrier's negligence, charterer-appellee's bill of lading expressly so stipulates i.e.:

> "28 . . .
>
> NEW JASON CLAUSE (a) In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, *whether due to negligence or not, for which, or for the consequences of which the carrier is not responsible by statute, contract, or otherwise,* the goods, shippers, consignees, or Owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods." (Emphasis added) (Ex. 4 at Clause 28 at 300A-301A)

Similarly where charterer-appellee wishes to assure that the carrier can recover from cargo so much of cargo's loss or damage as the carrier must pay to another colliding vessel as the result of a collision caused by the *negligence* of *both* charterer-appellee's vessel and the other vessel, charterer-appellee's bill of lading expressly so stipulates:

> "29 . . .
>
> BOTH TO BLAME COLLISION CLAUSE. If the liability for any collision in which the vessel is involved while performing this bill of lading fails to be determined in accordance with the laws of the United States of America, the following clause shall apply:—
>
> If the vessel comes into collision with another vessel as a result of the negligence of the other vessel *and any act, neglect, or default of the carrier in the navigation or in the management of the vessel,* the

Owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying vessel or her Owners in so far as such loss or liability represents loss of or damage to any claim whatsoever of the Owners of the said goods paid or payable by the other or non-carrying vessel or her Owners to the owners of the goods and set off, recouped or recovered by the other or non-carrying vessel or her Owners as part of their claims against the carrying vessel or carrier. . . ." (emphasis added) (Ex. 4 at Clause 29 at 300A-301A)

Likewise, where charterer-appellee wishes to assure itself of the right, with respect to its forwarding the goods by an on-carrier, of choosing an on-carrier whose bill of lading exempts it from liability for *negligence,* charterer-appellee's bill of lading expressly so states:

"SPECIAL CLAUSES.

. . . . . .
. . . . . .

III If the goods are consigned or forwarded to a point where the vessel does not discharge, the Shipper constitutes the Carrier his Agent to forward the goods to or toward their ultimate destination or otherwise shall cease upon the goods leaving the actual custody of the Carrier. Such forwarding Carriage shall be subject to the terms of the usual Bill of Lading, receipt, contract or shipping document of the on-carrier whether issued or not including, but without limiting the generality of the foregoing, any valuation of the goods, or limitation of liability, or exemption from liability or the requiremnt for notice of claim or commencement of suit, even though such terms be less favourable to the Shipper than the terms of this Bill of Lading, whether known to the Shipper or not, even though exempting the on-carrier from

liability for *negligence* . . .'' (Ex. 4 at Special Clause III at 300A-301A) (Emphasis added)

Thus it is clear both by

A) the ordinary rules of interpretation of common carrier contracts of adhesion, and by

B) the ''intent'' of the parties as appears from the careful draftsmanship of Charterer-Appellee's bill of lading that it was neither the ''intent'' of the parties, nor the effect of Charterer-Appellee's ''freight earned'' clause that charterer-appellee may recover full freight on cargo lost due to the master's negligent navigation. Accordingly the District Court decision awarding full freight on cargo lost or non-delivered due to the master's negligent navigation should be reversed.

POINT III

Charterer-appellee can not collect interest for the period prior to judgment at the rate of 7½% and 6% when its bill of lading specifically provides that "interest at 5% per annum shall be paid on any freight and charges remaining unpaid after due date of payment."

It will, of course, be unnecessary to argue this point if it is held that charterer-appellee is not entitled to collect freight on goods lost or non-delivered because of the master's negligent navigation.

Should freight be awarded to charterer-appellee, however, then its following bill of lading clause is determinative of the amount of interest to be awarded:

> ''Interest at 5% per annum shall be paid on any freight and charges remaining unpaid after due date of payment.'' (299A Ex. 4, unnumbered paragraph in front of bill of lading.)

CONCLUSION

The judgment of the District Court awarding charterer-appellee full freight on cargo lost or non-delivered because of the master's negligent navigation and awarding interest thereon at 7½% and 6% should be reversed.

Respectfully submitted,

DAVID P. DAWSON,
Attorney for Plaintiff-Appellant,
Keller Industries, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Complaint of

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability.

COMPANIA NAVIERA EPSILON, S.A.,

Appellant.

BINGHAM & COMPANY, ET AL.,

Plaintiffs-Appellants,

vs.

THOS. & JNO. BROCKLEBANK, LTD.,

Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 18th day of June, 1974, he served two copies of Brief on Behalf of Appellant Keller Industries on See attached list, the attorneys for See attached list by delivering to and leaving same with a proper person in charge of their office at See attached list in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
18th day of June, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-547920
Qualified in New York County
Commission Expires March 30, 1976

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